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U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re J.R. Simplot Company

Serial No. 74/582,421

Aaron B. Retzer of Epstein, Edell & Retzer for applicant.

Carol A. Spils, Trademark Examining Attorney, Law Office 101 (R. Ellsworth Williams, Managing Attorney).

Before Sams, Hohein & Walters, Administrative Trademark Judges.

Opinion by Hohein, Administrative Trademark Judge:

An application has been filed by J.R. Simplot Company to register the mark "FIVE ALARM" for "frozen guacamole".[1]

Registration has been finally refused under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), on the ground that applicant's mark, when applied to its goods, so resembles each of the following four marks, which are asserted to constitute a "family of marks" owned by the same registrant, as to be likely

[1] Ser. No. 74/582,421, filed on October 5, 1994, which alleges a bona fide intention to use the mark in commerce.

to cause confusion, mistake or deception: the marks "1-ALARM,"[2] "2-ALARM"[3] and "3-ALARM,"[4] each of which is registered for "mixtures of spices used in food preparation," and the mark "FALSE ALARM,"[5] which is registered for "spices used in food preparation".

Applicant has appealed. Briefs have been filed, but an oral hearing was not held. We reverse the refusal to register with respect to the citation of the registration for the "FALSE ALARM" mark, but we affirm the refusal to register as to the cited registrations for the "1-ALARM," "2-ALARM" and "3-ALARM" marks.

Turning first to consideration of the respective goods, applicant notes in its brief that "guacamole is defined in the American Heritage Dictionary of the English Language as 'a thick paste of mashed avocado, often seasoned with tomato, peppers or other condiments and usually served as a dip or in salads.'" Applicant concedes, therefore, that "guacamole can be, and frequently is, seasoned with spices." However, inasmuch as "[v]irtually every prepared food in the supermarket is seasoned with spices," applicant insists that the mere fact that spices or mixtures of spices could be used to make its frozen guacamole

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[2] Reg. No. 1,078,546, issued on November 29, 1977, which sets forth dates of first use of December 18, 1964; renewed.

[3] Reg. No. 1,124,120, issued on August 14, 1979, which sets forth dates of first use of December 18, 1964; combined affidavit §§8 and 15.

[4] Reg. No. 1,078,547, issued on November 29, 1977, which sets forth dates of first use of December 18, 1964; renewed.

[5] Reg. No. 1,079,984, issued on December 20, 1977, which sets forth dates of first use of December 18, 1964; renewed.

spicier before serving does not establish that consumers would reasonably consider such products as emanating from or affiliated with the same source. According to applicant, food preparation spices and "[d]ry spice mixes are not the same as frozen guacamole, they are not used similarly and they neither compete with nor compliment one another sufficiently to introduce the probability of consumer mistake or confusion." Applicant notes, furthermore, that spices and mixtures of spices for use in food preparation would not be sold on the same supermarket shelves as frozen guacamole, which would be found in the same aisles as other frozen prepared foods.

It is well settled, however, that goods need not be identical or even competitive in nature in order to support a finding of likelihood of confusion. Instead, it is sufficient if the goods are related in some manner and/or the circumstances surrounding their marketing are such that they would be likely to be encountered by the same persons under situations that would give rise, because of the marks employed in connection therewith, to the mistaken belief that they originate from or are in some way associated with the same producer or provider. See, e.g., Monsanto Co. v. Enviro-Chem Corp., 199 USPQ 590, 595-96 (TTAB 1978) and In re International Telephone & Telegraph Corp., 197 USPQ 910, 911 (TTAB 1978). Moreover, it is well established that the issue of likelihood of confusion must be determined on the basis of the goods as they are set forth in the involved application and cited registration(s) and that, absent any specific limitations therein, such issue is to be decided on the

basis of all normal and usual channels of trade and methods of distribution for the respective goods. See, e.g., CBS Inc. v. Morrow, 708 F.2d 1579, 218 USPQ 198, 199 (Fed. Cir. 1983); Squirtco v. Tomy Corp., 697 F.2d 1038, 216 USPQ 937, 940 (Fed. Cir. 1983); and Paula Payne Products Co. v. Johnson Publishing Co., Inc., 473 F.2d 901, 177 USPQ 76, 77 (CCPA 1973).

Here, we agree with the Examining Attorney that, inasmuch as registrant's goods are very broadly defined as being "mixtures of spices used in food preparation" and as "spices used in food preparation," it must be presumed for purposes of resolving whether there is a likelihood of confusion that:

> The registrant's goods ... include spices used to make guacamole dip. Dry [spices or] spice mixtures are often added to fresh ingredients, like avocados and sour cream, to make dips.

Because consumers may consequently purchase spices or spice mixtures either to make guacamole or to add flavor to already prepared guacamole, registrant's food preparation spices and spice mixtures must be considered products which are closely related to applicant's frozen guacamole. Thus, notwithstanding that the former would not be sold in the frozen foods section of supermarkets or grocery stores like applicant's goods, the shared channels of trade for these complementary food products makes it likely that, if the respective goods are sold under the same or similar marks, confusion as to their source or sponsorship would be likely to occur.

Turning, then, to consideration of the marks at issue, the Examining Attorney contends that "consumers are likely to

confuse [the applicant's mark] FIVE ALARM with the registrant's *family* of ALARM marks" (*emphasis added*). We note, however, that there is absolutely nothing of record which shows that registrant has a family of such marks.[6] Specifically, the Examining Attorney has not furnished any evidence which demonstrates that registrant's marks have been promoted in a manner sufficient to create a recognition or awareness among the purchasing public of the common ownership thereof so that a family of marks, characterized by the term "ALARM" as its distinguishing element, in fact exists. See, e.g., La Maur, Inc. v. Bagwells Enterprises, Inc., 199 USPQ 601, 606 (TTAB 1978) and Polaroid Corp. v. American Screen Process Equipment Co., 166 USPQ 151, 154 (TTAB 1970). The mere fact that registrant owns a number of marks sharing the term "ALARM," as shown by its ownership of the four cited registrations, is alone an insufficient basis on which to predicate the existence of a family of marks. See, e.g., Hester Industries, Inc. v. Tyson Foods, Inc., 2 USPQ2d 1646, 1647

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[6] As stated in J & J Snack Foods Corp. v. McDonald's Corp., 932 F.2d 1460, 18 USPQ2d 1889, 1891-92 (Fed. Cir. 1991):

> A family of marks is a group of marks having a recognizable common characteristic, wherein the marks are composed and used in such a way that the public associates not only the individual marks, but the common characteristic of the family, with the trademark owner. Simply using a series of similar marks does not of itself establish the existence of a family. There must be a recognition among the purchasing public that the common characteristic is indicative of a common origin of the goods. ....
>
> Recognition of the family is achieved when the pattern of usage of the common element is sufficient to be indicative of the origin of the family. It is thus necessary to consider the use, advertisement, and distinctiveness of the marks, including assessment of the contribution of the common feature to the recognition of the marks as of common origin.

(TTAB 1987); Consolidated Foods Corp. v. Sherwood Medical Industries Inc., 177 USPQ 279, 282 (TTAB 1973); Polaroid Corp. v. American Screen Process Equipment Co., supra; and Polaroid Corp. v. Richard Mfg. Co., 341 F.2d 150, 144 USPQ 419, 421 (CCPA 1965). Accordingly, the issue of likelihood of confusion must be determined by comparing applicant's mark for its goods with each of registrant's marks for its various products.

With respect to registrant's "FALSE ALARM" mark for spices used in food preparation, the Examining Attorney insists that such mark, like applicant's "FIVE ALARM" mark for frozen guacamole, is not only dominated by the word "ALARM," but shares the same "clever play on words" which is engendered by analogizing the spiciness of a product to various degrees of fire emergencies.[7] Such marks, the Examining Attorney contends, consequently project a very similar overall commercial impression since the mark "FALSE ALARM carries with it the impression of a fire, or rather a call to a non-existent fire, thus possibly suggesting 'mild' spices or no spices at all." We agree with applicant, however, that when considered in their entireties, the marks "FIVE ALARM" and "FALSE ALARM" are quite different in sound and appearance. More importantly, such marks simply do not share

[7] We judicially notice, in this regard, that The American Heritage Dictionary of the English Language (3rd ed. 1992) at 658 defines "false alarm" as "**1.** An emergency alarm, such as a fire alarm, that is set off unnecessarily. **2.** A signal or warning that is groundless." It is settled that the Board may properly take judicial notice of dictionary definitions. See, e.g., Hancock v. American Steel & Wire Co. of New Jersey, 203 F.2d 737, 97 USPQ 330, 332 (CCPA 1953) and University of Notre Dame du Lac v. J. C. Gourmet Food Imports Co., Inc., 213 USPQ 594, 596 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

a sufficiently similar connotation since the mark "FALSE ALARM" does not allude to, and in fact conveys basically the opposite of, the association of exceedingly high spiciness or heat which is suggested by the phrase "FIVE ALARM". Thus, even allowing for the fallibility of memory of the average consumer, who normally retains only a general rather than a specific recollection of marks encountered in the marketplace, the marks "FIVE ALARM" and "FALSE ALARM" are distinguishable and their use, respectively, in connection with frozen guacamole and spices used in food preparation would not be likely to cause confusion.

However, with respect to each of registrant's other marks for mixtures of spices used in food preparation and applicant's "FIVE ALARM" mark for the closely related product of frozen guacamole, we concur with the Examining Attorney that confusion concerning the origin or affiliation of the respective goods is likely. As pointed out by the Examining Attorney, the marks "1-ALARM," "2-ALARM," "3-ALARM" and "FIVE ALARM" are highly similar in connotation and overall commercial impression since they "all suggest the intensity of a fire, differing only in the degree indicated by the numbers". Applicant, in fact, concurs that "[t]he meaning of FIVE ALARM is similar to 1-ALARM, 2-ALARM and 3-ALARM inasmuch as each indicates one in a progression of designations for the severity of a fire and each is used to suggest a level of hot spiciness." Although applicant emphasizes that, as acknowledged by the Examining Attorney, such marks differ in degree, we nonetheless find--as applicant admits--that in terms of "[t]he overall commercial impression of the marks,

... [they] share a connotation of spiciness." Because the respective marks are so similarly structured, with the word "ALARM" preceded by a numerical term, it is the general connotation of an intensity of heat or spiciness, rather than the specific level or degree thereof, which is likely to cause consumers to believe that such closely related goods as frozen guacamole and food preparation spice mixtures emanate from or are affiliated with the same entity. Thus, as the Examining Attorney observes:

> Consumers will most likely remember ... the various combinations of the numbers with the [word] ALARM simply as indicating the spice intensity of the goods. Consumers are familiar with the terms "one, two, three, four, five, etc., alarm" when used in connection with a fire. And, many consumers will appreciate the analogy to a fire when those terms are used in connection with spicy food. Therefore, to the ordinary consumer, the marks 1-ALARM, 2-ALARM, 3-ALARM, and FIVE ALARM will be very similar in connotation, commercial impression and sound.

Accordingly, notwithstanding the slight differences in appearance caused by applicant's having spelled out the numerical term in its "FIVE ALARM" mark rather than using numbers as is the case with registrant's "1-ALARM," "2-ALARM" and "3-ALARM" marks, we find that in light of the substantial similarity in connotation and overall commercial impression, contemporaneous use of applicant's mark for frozen guacamole is likely to cause confusion with each of the above-noted marks of respondent for its mixtures of spices used in food preparation. Furthermore, to the extent that, due to the suggestiveness inherent in such

marks,[8] we may nevertheless entertain any doubt as to our conclusion in this regard, we must resolve such doubt--contrary to applicant's contention--in favor of the registrant. See In re Pneumatiques Caoutchouc Manufacture et Plastiques Kelber-Columbes, 487 F.2d 918, 179 USPQ 729 (CCPA 1973).

Decision: The refusal under Section 2(d) is reversed with respect to the citation of the registration for the mark "FALSE ALARM," but is affirmed as to the cited registrations for the marks "1-ALARM," "2-ALARM" and "3-ALARM".

J. D. Sams

G. D. Hohein

C. E. Walters
Administrative Trademark Judges,
Trademark Trial and Appeal Board

[8] In recognition thereof, the Examining Attorney additionally asserts that:

> [W]hile the numbers in combination with [the term] ALARM may indicate degrees of hotness of the spices [in the guacamole or spice mixtures], the term is not necessary for others in the food industry to use as a trademark to complete. Certainly, spiciness of food can be indicated in other ways. Registrant's creative use of "ALARM" as a ... feature of its trademarks does not prevent others from competing in the same trade channels for complimentary [sic] goods.